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Date: JUL 30 1996

In re: MARIA BLANCA GUILLEN-VAZQUEZ
GLORIA ESPERANZA MONTERO

DISSENTING OPINION: Lory D. Rosenberg, Board Member

I respectfully dissent. In my opinion, the circumstances under which the two respondents in these related cases gave the statements which formed the bases for the findings of deportability were so coercive that they violated the respondents' due process rights. The statements should therefore be suppressed and the deportation proceedings terminated.

In the instant case, the respondent Montero specifically testified at the deportation hearing that she was not advised of her rights when she was taken into custody (Montero tr. at 10-101). She further testified that she did not understand the documents she was signing, some of which were provided to her only in English, which she cannot read (Tr. At 101, 120). She testified that she signed the documents because, "I was desperate. I was scared. I was crying" (Montero tr. at 101). In addition, the I-213 Record of Deportable Alien in her case clearly indicates that the same Immigration and Naturalization Service officer who arrested her also interviewed her at Service offices and took her statements. This is a clear violation of the regulation at 8 C.F.R. § 287.3.

The Service officer who testified at Ms. Montero's hearing stated that he did advise the respondent of her rights. However, he admitted that he did not specifically recall doing so, but could so testify because "that's usually the procedure I follow" (Montero tr. at 69). He did not recall arresting anyone at the factory on the date of the search in question, but in fact he had no specific recollection of the details of the raid.

Similarly, the respondent Ms. Guillen testified that she was not warned of her rights when she was arrested and questioned (Guillen tr. at 182). She stated that no one told her what she was signing, and that what was put in front of her to sign was in English (Guillen tr. at 187). She testified that she was very nervous and scared, and that the agent questioning her "was very upset and said that if I want to remain in this country I must sign this paper" (Guillen tr. at 186). Ms Guillen further testified that she was treated roughly at the factory where she was arrested, that she was grabbed by the arm, no allowed to speak, and put in handcuffs (Guillen tr. at 175).

The agent who signed the I-213 in this case also testified that he gave the respondent her rights, but admitted that he knows he did so because he always does this. He had no independent, specific recollection of informing the respondent of her rights in this case (Guillen tr. at 53).

The respondents' testimony regarding their fears and feelings at the time of their arrests and at the time they gave their statements to immigration officers are proof of the inherently coercive nature of the manner in which they were arrested and questioned. The regulation which appears to have been violated in the Montoya case provides some protection against the coercive atmosphere surrounding raids such as the one which occurred here. The regulation provides that, where possible, the Service officer who arrests an alien may not also question him. The reason for this regulation is obvious: being arrested is likely to be an extremely intimidating event for an alien, and the fear surrounding such an event will hardly be lessened if the alien, following his or her arrest, is questioned by the same person who made the arrest.

The law of the Second Circuit, where this case arises, is that if a violation of the regulations occurs, evidence must be suppressed if prejudice from the violation occurs, but it the regulation involves a fundamental right derived from the Constitution or a federal statute, no prejudice need be shown. Waldron v. INS, 17 F.3d 511 (2d Cir. 1994). The majority, without discussion, concludes that, even if a violation of 8 C.F.R. § 287.3 occurred in the Montoya case, no prejudice occurred, and no fundamental or constitutional right was involved. I must disagree. In the first place, the documentary evidence of record indicates that a violation of the regulation in question did occur. The I-213 shows that the arresting and examining officer were one and the same. In the face of this, the Service is at the least called upon to rebut the presumption that a violation occurred, which it has not done.

Moreover, I find that the regulation in question does involve a fundamental constitutional right. The regulation clearly was promulgated to benefit the alien, by helping to mitigate the inherently coercive nature of arrests such as the one that occurred here. The fifth amendment right to due process and fundamentally fair immigration proceedings are involved in 8 C.F.R. § 287.3. When that regulation is violated, as it appears to have been in the Montoya case, the fruits of the violation, here, the respondent's statements, must be suppressed.

It is interesting to note that in another case similar to this, the Immigration Judge terminated proceedings upon violation of 8 C.F.R. § 287.3. That case is currently pending before this Board on a Service appeal. I further note that all the evidence indicates that a number of Service officers were involved in the raid on the factory in this case, so there is no reason to believe that there was no other qualified officer able to take the respondent's statement, as allowed in 8 C.F.R. § 287.3.

The Guillen case does not appear to involve a violation of 8 C.F.R. 287.3. However, the violation of that regulation in the Montoya case calls into question the fundamental fairness of the methods used in this factory raid. I am well aware that the Supreme Court has held that factory surveys used by the Service to seek out illegal aliens do not amount to unlawful searches and

seizures. INS v. Delgado, 466 U.S. 210 (1984). However, this decision and others by the Supreme Court and the lower courts do not mean that factory searches are not by their nature inherently coercive. They are, and careful safeguards must be put in place and employed to avoid violations of due process. In my opinion, the respondents' testimony in these two cases, which the Service attempted to rebut only by testimony regarding the "usual procedures" of its officers, adequately establishes that the manner in which the Service obtained statements from these two respondents was so coercive as to be a violation of due process. The violation of the regulation in one of the cases further proves my point. I would therefore suppress the statements made by the respondents, and terminate these proceedings.

For these reasons, I dissent.

Lory D. Rosenberg
Board Member

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

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In re: MARIA BLANCA GUILLEN-VAZQUEZ
GLORIA ESPERANZA MONTERO

IN DEPORTATION PROCEEDINGS

INDEX

APPEAL

ON BEHALF OF RESPONDENTS: Muzaffar A. Chishti, Esquire
Immigration Project
275 Seventh Avenue, 8th Floor
New York, New York 10001-6708

ON BEHALF OF SERVICE: Susan Egan
General Attorney

ORAL ARGUMENT: October 19, 1995

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] - Entered without inspection (both respondents)

APPLICATION: Termination of proceedings

I. INTRODUCTION

The respondents in these cases were arrested by the Immigration and Naturalization Service (the Service) as the result of the same chain of events which led to a consensual factory search of their place of employment. Identical legal issues are involved. The respondents are represented by the same counsel, who presented oral argument on their behalf before the Board of Immigration Appeals on October 19, 1995. In light of these factors, we have decided to address the cases in a single decision. There are a few variations particular to each case which will be mentioned when appropriate. The central issue presented is whether the Immigration Judge erred in denying the respondents' motions to suppress evidence.

II. CASE HISTORY

The respondents were arrested after an October 19, 1992, raid on the STC Knitting Corporation (STC) factory in Queens, New York, by the Employer Sanctions Unit of the Service. On that date, the respondents were issued separate Orders to Show Cause and Notice of Hearings, which charged them with deportability under section 241(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(B), as aliens who entered the United States without

inspection. The respondents were alleged to be natives and citizens of Ecuador. Respondent Guillen-Vasquez (Guillen) allegedly entered on or about December 25, 1978, and respondent Montero-Esperanza (Montero) in November 1989.

Ms. Guillen's deportation hearing concluded on October 25, 1994, and Ms. Montero's on October 27, 1994. The Immigration Judge denied each respondent's motion to suppress evidence obtained as the result of the October 19, 1992, arrests. She found that the deportation charges had been adequately established, and granted each respondent the privilege of voluntary departure.

III. FACTS

A. The Deportation Hearings

1. Respondent Guillen's Hearing

As noted above, the respondents were brought to the attention of the Employer Sanctions Unit during an investigation of their place of employment. During Ms. Guillen's hearing, the Service presented the testimony of Agent Riley, who worked in the Employer Sanctions Unit and was the case agent in the STC matter. The STC investigation began after the Unit received a transmission concerning two suspect alien registration cards, along with some other related anonymous complaints. 1/ The Unit conducted a surveillance of the factory, which proved inconclusive. See Guillen Tr. at 79-80. The Service subsequently requested employment records from STC. The documentation submitted in response contained some suspect alien registration numbers and other related information. The Service then arranged to enter the STC factory, with the employer's consent. The participating officers questioned the employees on the premises, and several were brought back to the Service office for processing on the suspicion that they were not legally in the United States.

The Service also produced the testimony of Service Agent Ricko, one of approximately 10 agents who assisted in the "raid." Agent Ricko processed respondent Guillen at the Service office. He questioned the respondent, took her statement, and prepared her Record of Deportable Alien (Form I-213) and related documentation. The officer served the respondent with her Order to Show Cause, and he testified that it was read to her in Spanish, a language in which he had been formally trained. See Guillen Tr. at 49.

1/ It later came to be known that STC's lawyer, a former Service official, had initiated some of the communication which led to the investigation. See Guillen Tr. at 99.

At her hearing, Ms. Guillen declined to answer any questions regarding her citizenship and related issues under the protection of the Fifth Amendment of the United States Constitution. See generally Matter of Guevara, Interim Decision 3143 (BIA 1990; 1991). The respondent explained that she was involved in pro-union activities while at STC. As a result, she alleged that her employer had taken extra efforts to ensure that she was present at work on October 19, 1992, while other employees were told to stay home.

The respondent testified that during the factory raid, she was approached and asked for documentation regarding her status in this country. She stated that she was later questioned by a second officer, who told her to be quiet and handcuffed her. She was brought to the Service office for processing after she failed to produce any documentation verifying that she was lawfully present in the United States. The respondent testified that she was never informed of her rights, and that she signed papers without being aware of their contents because she did not read or speak English. She explained that she only signed the papers because she was scared, and that they had not been translated for her.

2. Respondent Montero's Hearing

At Ms. Montero's hearing, the Service presented the testimony of Agent Meneses, another member of the Employer Sanctions Unit who participated in the STC factory investigation. Agent Meneses testified that he did not make any arrests at the factory, but that he had processed Ms. Montero at the Service office. He revealed that he is a Spanish-speaking native of Cuba. At the hearing, the parties agreed to accept a written statement of facts by Agent Riley. Its contents mirror the testimony that the agent presented at Ms. Guillen's hearing. 2/ See Agreed Statement of Facts, executed by Agent Riley, Exh. 8, Montero file.

Ms. Montero also invoked the Fifth Amendment at her hearing. The respondent stated that on October 19, 1992, several officers entered the factory in the morning through one door, and that they had blocked off another exit. The respondent was approached and asked if she had any "papers." She did not produce any, and was subsequently handcuffed and taken to the Service office for processing. The respondent recalled that Agent Meneses was present at the factory. The respondent claimed that she was never

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2/ Agents Ricko and Meneses both testified that their recollection of events was based on documentation taken at that time.

advised of her rights by Service officials, and that she was told that she had to sign certain documents if she wanted to remain in the country. She asserted that the documents were never read to her in Spanish, but she nonetheless felt compelled to sign them as requested.

3. Documentary Evidence

For each respondent, the Service submitted a Record of Sworn Statement in Affidavit Form (Form I-215C), a Record of Deportable Alien (Form I-213), and a Warning as to Rights in Administrative Proceeding - Interview Log (Form I-214A). All documents are dated October 19, 1992, and at various points contain the signatures of the respondent and the processing Service agent. Each form includes either a written Spanish translation of its contents, or an indication that the document was read to the respondent in Spanish. In their respective Form I-215Cs, each respondent stated that she was a native and citizen of Ecuador who had entered the country without inspection. These, and related documents, were the objects of the respondents' motions to suppress. 3/

B. Motion to Suppress

The respondents argued that the aforementioned documents should be suppressed because they were obtained as the result of egregious conduct which violated the Fifth Amendment. The respondents emphasized that the information was ultimately the result of retaliatory practices by STC which violated their First Amendment rights and the labor laws of this country. The respondents also argued that the conduct of the Service at the factory was illegal, and consequently any incriminating statements were obtained through coercion, rendering their admission to be fundamentally unfair. The respondents also charged that the Service violated its regulations in failing to inform the respondents of their rights in Spanish. See 8 C.F.R. § 242.2. Ms. Montero pursued the argument that her rights were further violated, because the same officer both arrested and interrogated her in violation of 8 C.F.R. § 287.3.

3/ Other evidence in the record includes documentation regarding the Service investigation and the fine eventually imposed upon STC. There is also a copy of a complaint brought before the National Labor Relations Board (NLRB) charging that STC engaged in unfair employment practices. On appeal, the respondent states that the NLRB case has been settled. See Guillen Appeal Brief at 3.

IV. DECISION OF THE IMMIGRATION JUDGE

The Immigration Judge denied the respondents' motions to suppress. 4/ The Immigration Judge found that there was no evidence indicating that the Service was an active participant in the retaliatory practices of STC Knitting Corporation. Further, she found that the conduct of STC was related to labor law violations and not to immigration law, and therefore must be remedied in a different forum. She concluded that the record in each case established that the Service utilized normal and proper procedure in initiating and carrying out the consent search of the STC factory, and that it was in compliance with Delgado v. INS, 466 U.S. 210 (1984).

The Immigration Judge found no evidence that the Service violated its own regulations or the United States Constitution in its processing of the respondents. She noted that, in each case, the Service produced evidence that the respondents were informed of their rights in their native language. She also noted that the respondents' multiple signatures on the documents in question undermined their claim that they were unaware of the contents. She found the testimony of the Service officers in each case to be more credible than the testimony offered by the respondents.

In Ms. Montero's case, the Immigration Judge found insufficient evidence to support the respondent's claim that she had been arrested and interrogated by the same officer in violation of 8 C.F.R. § 287.3. The respondent had argued that because Mr. Meneses' name appeared in the arrest and interrogation portions of the Form I-213, it was apparent that he had conducted both facets of the investigation. The Immigration Judge did not find this to be conclusive proof that Officer Meneses was actually the arresting officer, as he had testified that he did not make any arrests on that day. She also considered that the respondent never specifically testified that the same officer both arrested and interrogated her. See Montero Tr. at 163.

Upon admission of the Service's evidence, the Immigration Judge found that alienage had been adequately established in each case, and that the burden of proof therefore shifted to the respondents

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4/ The Immigration Judge issued a separate written decision in each case. However, the reasoning behind the decision to deny each motion to suppress was given during the hearing and was incorporated by reference into the final written decision. See Guillen Tr. at 212-22; Montero Tr. at 147-64.

to show the time, place, and manner of their entry. See section 291 of the Act, 8 U.S.C. § 1361. The respondents did not meet this burden, and the charges under section 241(a)(1)(B) were sustained. The Immigration Judge granted each respondent a period of voluntary departure upon the agreement of the Service.

V. THE RESPONDENTS' APPEALS

On appeal, the respondents reiterate the arguments presented in their motions to suppress. They emphasize the egregious conduct of the STC Knitting Corporation, and argue that by ordering the respondents' deportation, the government was encouraging unfair labor practices. They cite to Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984), in support of this argument and the general assertion that labor law protection extends to illegal aliens. The respondents also argue that their situation is analogous to that presented in Arguelles-Vasquez v. INS, 786 F.2d 1433 (9th Cir. 1986), vacated as moot, 844 F.2d 700 (9th Cir. 1988), and Gonzalez-Rivera v. INS, 22 F.3d 144 (9th Cir. 1994), where the court found that the egregious behavior of Service officers warranted the suppression of evidence subsequently obtained. The respondents assert that a similar application of the exclusionary rule is appropriate in their cases.

VI. EVALUATION OF THE APPEALS

A. Applicable Law

The established test for the admissibility of evidence in a deportation proceeding is whether the evidence is probative and whether its use is fundamentally fair so as to not deprive the alien of due process of law. See, e.g., Bustos-Torres v. INS, 898 F.2d 1053 (5th Cir. 1990); Baliza v. INS, 709 F.2d 1231 (9th Cir. 1983); Tashnizi v. INS, 585 F.2d 781 (5th Cir. 1978); Trias-Hernandez v. INS, 528 366 (9th Cir. 1975); Matter of Toro, 17 I&N Dec. 340 (BIA 1980); Matter of Ramirez-Sanchez, 17 I&N Dec. 503 (BIA 1980); Matter of Lam, 14 I&N Dec. 168 (BIA 1972).

The "exclusionary rule" arose in the context of criminal proceedings. It requires a court to suppress evidence that is the fruit of an unlawful arrest or of other official conduct which violates the Fourth Amendment. Matter of Velasquez, 19 I&N Dec. 377, 380 (BIA 1986), citing, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). It is well-established that the Fourth Amendment exclusionary rule is not applicable in deportation proceedings. INS v. Lopez-Mendoza, supra; Mendoza-Solis v. INS, 36 F.3d 12, at 14 (5th Cir. 1994).

However, in INS v. Lopez-Mendoza, supra, the Supreme Court indicated that the exclusionary rule might apply in deportation proceedings in the presence of egregious circumstances which transgress the notions of fundamental fairness and undermine the probative value of the evidence in question. Id. at 1051 n.5. This language has been applied by at least one federal court to preclude the admission of evidence that it determined was the result of "egregious" government conduct. See Orhorhaghe v. INS, 38 F.3d 488 (9th Cir. 1994); Gonzalez-Rivera v. INS, supra (both cases involved conduct of government officers which was deemed to be racially discriminatory); see also Matter of Toro, 17 I&N Dec. 340 (BIA 1980).

Furthermore, "[o]ne who raises the claim questioning the legality of the evidence must come forward with proof establishing a prima facie case before the Service will be called on to assume the burden of justifying the manner in which it obtained the evidence." Matter of Burgos, 15 I&N Dec. 278, 279 (BIA 1975); see also Matter of Ramirez-Sanchez, supra; Matter of Wong, 13 I&N Dec. 820, 821-22 (BIA 1971); Matter of Tang, 13 I&N Dec. 691, 692 (BIA 1971). We also have held that the alien's claim must be supported by his or her own testimony, and that the offering of an affidavit will not serve as an adequate substitute. See Matter of Barcenas, 19 I&N Dec. 609 (BIA 1988).

B. Application of Law to Facts

The evidence presented at the hearing establishes that the Service entered the factory by lawful means with the consent of an appropriate company official. No testimony was presented that the agents prevented any employees from leaving the premises. The mere fact that the Service posted officers near the exits does not establish that it behaved in a coercive or egregious manner. See Delgado v. INS, supra. Furthermore, it was reasonable for the Service officers to ask the employees on the premises if they had documentation authorizing their presence in the United States. Upon each respondent's failure to produce such documentation, the Service had the requisite reasonable cause to arrest the individuals and bring them in for processing. See id. We therefore see nothing in the record which indicates that the Service behaved in an unlawful manner at the factory.

In reaching our decision, we note that the respondents' testimony at the hearing was not particularly detailed and was vague in areas where the respondents carried the burden of proof. In contrast, the testimony of the Service agents was detailed and deemed to be more plausible by the Immigration Judge. This Board

ordinarily gives significant weight to the determinations of the Immigration Judge regarding the credibility of witnesses. See Matter of Burbano, Interim Decision 3229, at 4 (BIA 1994). We adhere to this practice in the current case, as the Immigration Judge's determinations are supported by the record.

The respondents both asserted that they were unaware of the contents of the documents they signed during processing at the Service office. However, the record establishes that the respondents were presented with either written or oral Spanish translations of the documents. This is established by the contents of the documents themselves, and the testimony of each agent regarding their ability to communicate in Spanish. Furthermore, there is no testimony which establishes that any signatures were obtained in a coercive or otherwise inappropriate manner. The respondents testified that they were scared; however, we see no evidence that this understandable emotion stemmed from anything but the general discomfort of being arrested. An allegation this serious must be supported by concise and reliable testimony, which simply is not present upon review of the records under consideration.

Ms. Montero asserts that the same officer both arrested and interrogated her in violation of 8 C.F.R. § 287.3. 5/ As noted above, the respondent has the burden of proving that evidence should be suppressed due to a regulatory violation. However, in the current case, Ms. Montero did not affirmatively testify that the same officer was directly involved in the two facets of her arrest at issue. Indeed, her testimony in this area was vague, and without a definitive statement on the issue, we cannot find that she has met her burden of proof. In making this determination, we have considered the arguments concerning Agent Meneses' signature on two areas of the Form I-213. However, this alone is not sufficient to meet the respondent's burden of proof.

5/ In pertinent part, the regulation reads:

> An alien arrested without a warrant of arrest under the authority contained in section 287(a)(2) of the Immigration and Nationality Act shall be examined as therein provided by an officer other than the arresting officer. If no other qualified officer is readily available and the taking of the alien before another officer would entail unnecessary delay, the arresting officer, if the conduct of such examination is a part of the duties assigned to him/her, may examine the alien. . . .

We also consider that Officer Meneses testified that he did not recall arresting anyone at the factory, and the Immigration Judge found this testimony to be more credible than that of Ms. Montero.

Furthermore, even if a regulatory violation is established, it does not necessarily follow that evidence subsequently obtained should be suppressed. In Waldron v. INS, 17 F.3d 511 (2d Cir. 1994), the court held that prejudice must be shown by the respondent before automatic suppression of evidence will occur, unless the violation involves a fundamental right derived from the Constitution or a federal statute. 6/ We see no fundamental or constitutional right which is invoked by 8 C.F.R. § 287.3. Rather, the regulation is in the nature of an agency-created right, for which a showing of prejudice is required. See also Jian v. INS, 28 F. 3d 256 (2d Cir. 1994).

Therefore, even assuming that the respondent was arrested and processed by the same officer, the respondent has failed to establish that she was prejudiced by the alleged dual role of Agent Meneses. Indeed, the respondent did not testify that she even remembered the same officer arresting and interrogating her, definitively undermining any claim of coercion or intimidation.

In sum, the respondents' central argument is that to allow evidence which was collected as the result of the factory raid would insult notions of fundamental fairness, and therefore an application of the exclusionary rule is warranted. However, although the record indicates that the respondents' former employer engaged in egregious behavior, there is nothing which establishes a due process or regulatory violation on behalf of the Service that would warrant the requested suppression of evidence. The record does not establish that the Service had any part in the employer's scheme. Therefore, the respondents are asking for a very broad application of the exclusionary rule, for which we find no basis for using in the cases at issue. See INS v. Lopez-Mendoza, supra.

Similarly, the Ninth Circuit Court of Appeals cases cited by the respondents are distinguishable. The cases involve conduct by Service officials themselves which was held to be racially

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6/ We note that in Waldron, the court clarified the holding in Montilla v. INS, 926 F.2d 162 (2d Cir. 1991). The Montilla case involved the alleged failure of a Service officer to adhere to the regulation concerning an alien's right to counsel. The court found that this involved a fundamental right derived from the Sixth Amendment, and therefore a showing of prejudice was not required.

discriminatory and therefore "egregious." In the current case, the Immigration Judge did not find any violations or misconduct by Service officials, a determination with which we agree. Therefore, the cases are significantly distinguishable on this basis. See Orhorgaghe v. INS, supra; Gonzalez-Rivera v. INS, supra. Furthermore, the respondents' cases do not fall within the jurisdiction of the Ninth Circuit Court of Appeals in any event.

Finally, we distinguish the case of Sure-Tan, Inc. v. NLRB, supra. This case involved a complaint brought before the National Labor Relations Board that the employer in question had contacted the Service in retaliation against illegal alien employees who were active in union activities. The Court held that illegal aliens were protected by the National Labor Relations Act (NLRA), and that the conduct of the employer in this case violated that act. The Court emphasized its interest in protecting legal workers by avoiding the creation of a sub-class of illegal workers who would be employable for lower wages. There is nothing in the decision which would preclude the subsequent deportation of illegal aliens despite their protection by the NLRA. Indeed, the Court rejected the possibility of reinstating the deported employees as a remedy, because it would conflict with the objective of deterring illegal immigration as embodied in the Act. See Id. at 902-903. Therefore, the respondents' reliance on this case is misplaced. The Immigration Court is not the correct forum to address an employer's violations of this country's labor laws.

VII. CONCLUSION

In conclusion, we agree with the Immigration Judge's decision to deny the respondents' motions to suppress evidence, as the respondents did not meet their burdens of proof. The Service submitted sufficient evidence of alienage to shift the burden of proof under section 291 of the Act to the respondents. They did not show the time, place, and manner of their entry, and the deportation charge against each was properly sustained. Accordingly, the appeals will be dismissed.

ORDER: The appeals are dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the

district director; and in the event of failure so to depart, the respondents shall be deported as provided in the Immigration Judge's order.

FOR THE BOARD